

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERMELINDO DUARTE SALINAS,

Defendant-Appellant.

UNPUBLISHED

October 24, 2006

No. 264006

Muskegon Circuit Court

LC No. 02-047140-FC

Before: Cavanagh, P.J., Bandstra and Owens, JJ.

PER CURIAM.

Defendant appeals by right from his resentencing after remand on his convictions for possession with intent to deliver greater than 650 grams of cocaine, MCL 333.7401(2)(a)(i), delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and for possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm in part, reverse in part, and again remand for resentencing consistent with this opinion.

Defendant was originally sentenced to 12 to 30 years for the possession with intent to deliver conviction, 6 months to 20 years for the delivery conviction, and 2 years for the felony-firearm conviction. However, on February 8, 2002, when defendant committed his offenses, the statute provided for a minimum sentence of 20 years for possession with intent to deliver 650 grams or more of cocaine and the offense of delivery of less than 50 grams of cocaine provided for a minimum sentence of 1 year. The circuit court sentenced defendant to less than the mandatory minimum because it retroactively applied amendments to the drug laws that altered the gradations of prohibited conduct and lessened the penalties.

Defendant appealed his convictions by right. The prosecutor cross-appealed the minimum sentences for defendant's convictions of possession and delivery. This Court affirmed defendant's convictions and remanded for resentencing to comply with the mandatory minimums in effect when defendant committed the offense. *People v Salinas*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 2004 (Docket No. 247664). On remand, the circuit court resentenced defendant to 20 to 35 years, 1 to 20 years, and 2 years, respectively, to comply with the statutory minimums in effect when defendant committed his offenses. However, without explanation, the circuit court also raised defendant's maximum sentence for his conviction for possession with intent to deliver more than 650 grams of cocaine. Defendant now appeals by right from his resentencing following remand.

Defendant contends that he should be resentenced under the amended version of MCL 333.7401(2)(a)(ii) with its lessened sentencing provisions that now applies to the amount of cocaine that he possessed when he violated MCL 333.7401(2)(a)(i), because his appeal was pending on direct review when the amendments became effective. This Court reviews de novo the legal issue whether a statute should apply retroactively. *People v Thomas*, 260 Mich App 450, 458-459; 678 NW2d 631 (2004).

This Court already addressed this issue in the first appeal and found that the amendments to the drug laws under which defendant was convicted do not apply retroactively. Moreover, the issue of the retroactivity of the amendments to MCL 333.7401 has been extensively reviewed in *People v Doxey*, 263 Mich App 115, 119-123; 687 NW2d 360 (2004) and *People v Thomas*, 260 Mich App 450, 458-459; 678 NW2d 631 (2004). Basically, these cases reason that amendments of statutes are generally presumed to operate prospectively unless the legislature clearly manifests a contrary intent. After extensively analyzing the amendments, this Court concluded that the plain language of the amendments did not indicate any legislative intent that the amendments should be applied retroactively. Further, in *Doxey, supra* at 123, this Court concluded specifically that MCL 333.7401(2)(a)(iii) "operates prospectively only" and that the trial court in that case erred in applying the amended sentencing provisions.

Defendant's reliance on *People v Schultz*, 435 Mich 517, 460 NW2d 505 (1990), as authority for the retroactive application of ameliorative amendments to the drug laws is misplaced in this case. Unlike the amendments in *Schultz*, the amendments to MCL 333.7401 do not merely lessen the sentencing provisions for the same prohibited conduct, they also revise the gradations of prohibited conduct. *Doxey, supra* at 119-123. Further, there is no clemency issue here as in *Schultz*. In this case, the evidence showed that defendant possessed over 650 grams of cocaine. Therefore, we conclude, as this Court previously determined in the first appeal, that the amendments to the drug statutes in question apply prospectively only and that defendant was properly resentenced to the mandatory minimums provided in the statutes when defendant committed his offenses.

Defendant also contends that he should be resentenced to reduce the maximum sentence for his conviction under MCL 333.7401(2)(a)(i) from 35 years to 30 years. Defendant argues that the Court of Appeals remanded for resentencing based on the invalid minimum sentences, not because of an invalid maximum sentence and that, therefore, the circuit court did not have the authority to increase defendant's maximum sentence. We agree.

This Court reviews de novo challenges to the legality of a sentence. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). A trial court may set aside a sentence only if it is invalid. *People v Whalen*, 412 Mich 166, 169; 312 NW2d 638 (1981); *People v Harris*, 224 Mich App 597, 600; 569 NW2d 525 (1997). An invalid sentence is one imposed through error or defect in the sentence or sentencing procedure, which entitles a defendant to be resentenced. *People v Pfeiffer*, 207 Mich App 151, 157-158; 523 NW2d 640 (1994). "Even courts of appeal are without the authority to set aside a valid sentence; rather, the sentence must be found disproportionate, or otherwise invalid, before an appellate court can overturn it." *In re Dana Jenkins*, 438 Mich 364, 369 n 3; 475 NW2d 279 (1991), abrogated in part on other grounds *People v Mitchell*, 454 Mich. 145, 176; 560 NW2d 600 (1997). When a court imposes a partially invalid sentence, the sentence may not be wholly annulled, but is to be set aside only with respect to the unlawful portion. *People v Thomas*, 447 Mich 390; 523 NW2d 215 (1994).

In defendant's prior appeal, this Court found only that defendant's minimum sentences for his two drug convictions were invalid. The Court of Appeals did not find that the 30-year maximum was invalid. In the absence of any invalidity of the 30-year maximum or the articulation of a lawful rationale for increasing the presumably valid original maximum sentence of 30 years, we remand this case for resentencing to the 30-year maximum that the circuit court originally imposed.¹

Affirmed in part, reversed in part, and remanded in part for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens

¹ We also note that the circuit court correctly sentenced defendant on the record to 1 to 20 years for his conviction of delivery of less than 50 grams of cocaine, following the first remand, and defendant notes in the instant appeal that he does not contest the maximum sentence for his delivery conviction. However, the amended judgment of sentence contains a typographical error, relating this sentence as 1 to 2 years. On second remand, the circuit court should also complete the ministerial task of correcting this error.